



INTERIOR BOARD OF INDIAN APPEALS

Phil Foutz v. Acting Navajo Area Director, Bureau of Indian Affairs

21 IBIA 273 (03/27/1992)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

PHIL FOUTZ

v.

ACTING NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-73-A

Decided March 27, 1992

Appeal from a cease and desist order issued in regard to a commercial operation located within the boundaries of the Navajo Reservation.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Generally

The Board of Indian Appeals is not a court of general jurisdiction. It has only that authority which has been delegated to it by the Secretary of the Interior. It has not been delegated authority to determine whether title to land is properly in the United States in trust for an Indian tribe or individual as opposed to being in fee ownership.

2. Indians: Lands: Generally--Indians: Lands: Trespass: Generally

It is the responsibility of the Bureau of Indian Affairs to take action against a person shown by state and Federal land title records to be in trespass on land held by the United States in trust for an Indian tribe.

APPEARANCES: Robert D. Benson, Esq., Farmington, New Mexico, for appellant; Thomas O'Hare, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for the Area Director; Anthony Aguirre, Esq., Navajo Nation Department of Justice, Natural Resources Unit, Window Rock, Arizona, for intervenor Navajo Nation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Phil Foutz seeks review of a February 26, 1991, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), ordering appellant to cease and desist certain commercial operations on land alleged by the Area Director to be held by the United States in

trust for the Navajo Nation (Nation). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant operates a commercial enterprise, the Bitahochee Trading Post or Company, within the SW¼ of sec. 12, T. 23 N., R. 21 E., Gila and Salt River Base and Meridian, Navajo County, Arizona. ^{1/} Although this quarter section is within the boundaries of the Navajo Reservation, appellant contends that his business is located on fee land which was leased to him by Helen Burgess on January 17, 1990.

Based upon a field inspection, the Area Director determined that the land on which appellant's business is located is Navajo tribal trust land. In order to verify the status of the land, the Area Director requested information from the Navajo County Assessor on the land's status as shown in county records. The County Assessor responded on October 26, 1990, stating that, according to county records, the only fee land in the quarter section is a parcel owned by the Assembly of God Church. The County Assessor further indicated that its "possessory rights" roll did not show any fee land in the quarter section as being under lease.

On November 6, 1990, the Area Director wrote appellant:

Recent field inspections by Bureau officials have revealed a commercial business operation within the Navajo Reservation near the old Bitahochee Trading Post. It has also come to our attention that you have asserted fee simple ownership to the land upon which this commercial operation is located. Our records indicate this land in question near Indian Wells, Navajo County, Arizona, is Navajo trust land.

In carrying out our trust responsibility to the Navajo landowners, we are therefore formally requesting that you prove your assertion of ownership. Acceptable proof of ownership would be to provide us with copies of a valid deed to the land in question. You have thirty (30) days to respond to our request by providing us with valid proof of ownership in fee simple to this parcel of land or we will be obligated by our trust responsibility to take steps to protect this land against adverse possession.

A similar letter was sent to Burgess on November 13, 1990.

Burgess responded on November 27, 1990, by providing a copy of the deed by which she and Arlene Wilkins acquired the property in 1955. Burgess

^{1/} It appears that appellant operates this business with his son, Brian. Only appellant appealed from the Area Director's decision. The Board's decision applies to both appellant and his son.

stated: "Enclosed is a copy of the deed [appellant] presented to me also description he said he acquired from records in the land office at Window Rock, Ariz. 2/ [Appellant] sent me said lease contract to sign."

By letter dated December 17, 1990, the Nation requested BIA assistance in issuing and enforcing a cease and desist order against appellant's commercial operation. The Nation indicated that appellant was operating a business on Navajo trust lands without a business license, in violation of Navajo tribal law. The Nation also requested assistance in removing appellant from its trust lands. 3/

On January 14, 1991, the Area Director wrote appellant, stating:

Field inspections by Bureau personnel have revealed the existence for the past 18 months of a commercial operation known as the Bitahochee Trading Company in the Indian Wells Chapter, Navajo County, Arizona. This area has been within the exterior boundaries of the Navajo Reservation since 1934. The land is located within the SW/4, Section 12, T. 23 N., R. 21 E., G&SRBM, Navajo County, Arizona. We are aware from your recent correspondence that Helen Burgess has asserted ownership in fee simple to the land upon which this commercial operation is located and that you have entered into a lease with her which you purport to be legally valid.

After a thorough review of the land ownership records of Navajo County and the Bureau of Indian Affairs and review of correspondence sent to this office by Ms. Burgess and you, I find that there is a lack of evidence to support your claim that Ms. Burgess owns the land now wrongfully occupied by Bitahochee Trading Company. This land is actually Navajo Indian Trust Land. Since this occupancy is based upon the spurious ownership claim of Ms. Burgess, the Bitahochee Trading Company has no legal right nor right under color of law to the land it occupies.

Therefore, you, doing business as Bitahochee Trading Company, have thirty days from the receipt of this letter to vacate the premises. You are to remove all surface and subsurface structures and improvements from the site and you are to restore the land to its original state prior to your occupancy. * * * Bureau and Navajo Tribal officials * * * will monitor your restoration efforts. You will be held legally responsible for

2/ Window Rock, which is the headquarters for the Navajo Tribe and was the headquarters for BIA, is located in Apache County. Window Rock is not the county seat of Apache County. Holbrook is the county seat of Navajo County, in which the land in question is located.

3/ In its brief the Nation indicates that it had been attempting to remove appellant from the reservation since 1988.

all damages to the land and all consequential damages resulting from your unauthorized occupancy.

A similar letter was sent to Burgess.

When appellant did not vacate the premises, by letter of February 26, 1991, the Area Director ordered appellant "to cease and desist all commercial operations as well as other occupancy. This order will remain in effect until such time as you can provide evidence of the legal right to occupy the land."

The Board received appellant's notice of appeal from this decision on April 3, 1991. Briefs have been filed on appeal by appellant, the Area Director, and the Nation as intervenor. ^{4/} Although she was notified of the pendency of this appeal and has received copies of all filings, Burgess has not appeared.

Discussion and Conclusions

Appellant argues that the land he has leased from Burgess cannot be in trust status because the administrative record contains no documents concerning the chain of title between 1929 and 1936. Appellant contends that this break in the chain of title defeats the claim of the United States that the land was removed from fee status. Appellant asserts at page 3 of his opening brief:

It is a basic proposition of real property law that there must exist a conveyance, in some valid form, from an individual holding title to the property in order for some other individual to obtain title to the property. Here the Record shows that the property was fee in nature as a result of the Homestead Patent recorded in 1909. The record, as certified by the [Area Director] * * * does not show any valid transaction converting the fee nature of the property to lands held in trust. Afterall, the only basis for any assertion to the claim that the land is trust property is that some conveyance subsequent to 1953 placed the property in trust for The Navajo Nation, which would result in any such subsequent conveyance being tainted by the earlier deficiencies in the chain of title. As such, the Administrative Record is inadequate or insufficient to support the decision rendered by the [Area Director] and that decision must therefore be reversed.

Appellant contends that the Area Director's decision was arbitrary and capricious because it was not supported by the record.

^{4/} The Nation was granted intervenor status by Board order dated July 22, 1991. Appellant subsequently filed a motion opposing the Nation's participation as an intervenor. Appellant's arguments have been considered and are each rejected as being without merit or contrary to established law. His motion is therefore denied.

In his reply brief, appellant expands and/or clarifies his argument by asserting that the Area Director had no authority to make a determination as to whether the land in question is fee or trust property and that, because of this lack of authority, his decision must be reversed.

Both the Area Director and the Nation base their claim that the land is in trust status on a January 15, 1963, quitclaim deed from Burgess and Wilkins to "The United States of America in trust for the Navajo Tribe of Indians." It appears that appellant's argument is that Burgess did not have clear title, and therefore could not have conveyed the property to the United States. ^{5/}

[1] The Board's jurisdiction in this case has been questioned. As the Board has previously stated, it is not a court of general jurisdiction, and has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to determine whether title to property is properly in the United States in trust for an Indian tribe or individual as opposed to being in fee ownership. Cf. Tsosie v. Navajo Area Director, 20 IBIA 108, 114 (1991) (the Board does not have jurisdiction to determine the validity of a trust patent issued by the Bureau of Land Management or to determine aboriginal title to land). See also Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63, 66-67 (1990).

[2] However, the Board is not required to make such a determination in order to reach a decision in this appeal. Both State and Federal land title records show that the land at issue was conveyed in 1963 by Burgess and Wilkins to the United States in trust for the Nation. BIA, the Nation, and Navajo County all agree that the land is in trust status. After careful examination of the deeds and maps in the record and provided with the various filings, ^{6/} the Board concludes that the Area Director had substantial evidence that the land was held in trust for the Nation. Burgess is asserting ownership of the property contrary to State and Federal land title records. Until such time as she proves, in an appropriate forum, that she owns this property, it is BIA's responsibility to act to protect trust property under its jurisdiction. The Area Director did not act

^{5/} Apparently, however, appellant believes Burgess has sufficient title to lease the property to him, even though he asserts that she could not convey it to someone else. This is an interesting legal position since a lease is a conveyance of property.

^{6/} Appellant alleges that 43 CFR 4.318 prevents the Board from considering anything that was not in the record certified to it by the Area Director. 43 CFR 4.318 provides that an appeal is limited to the issues that were before the Area Director, except that the Board may exercise the inherent authority of the Secretary to correct a manifest injustice or error. This regulation does not limit the evidence the Board may consider. Furthermore, under 43 CFR 4.24(a)(4), the Board's decision may be based on any and all evidence presented during the course of an appeal as long as that evidence is made available to the parties.

arbitrarily or capriciously in ordering appellant to cease and desist his commercial operation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Navajo Area Director's February 26, 1991, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge